19 (1)

IN THE

Supreme Court of the United States

ANATOLIY ZOLOTAREV; YEVGENIY SKURATOVSKY, RICHARD GLASSMAN; MORRIS JACOBS; MICHAEL HALL; IGNACIO REYES, PETITIONERS

v.

CITY AND COUNTY OF SAN FRANCISCO; JOHN SADORRA; RENATO SOLOMON; VERNON CRAWLEY; MICHAEL ELLIS; DORIS LANIER,; ELSON HAO; JIM WACHOB; ALAN DEGUZMAN; TOM HIDAYAT

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether and under what circumstances the federal rule of discovery -accrual applies to Petitioners' causes of action under 42 U.S.C. 1981, 1983, 1985 and 1986, alleging employment discrimination and constitutional violations which were not discoverable by Petitioners within the statutory limitations period.

2. Whether and under what circumstances equitable estoppel is available to Petitioners whose actions for employment discrimination and constitutional violations under 42 U.S.C. 1981, 1983, 1985 and 1986 were not discoverable by Petitioners within the statutory limitations period

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The opinion of the United States Court of Appeals for the Ninth Circuit (Pet. App.1a - 17a) is published at 535 F.3d 1044. The district court's order granting defendants' motion for partial summary judgment and dismissing the claims of Petitioners Anatoliy Zolotarev and Yevgeniy Skuratovsky (Pet.App. 18a – 30a) is unpublished. The district court's order granting defendants' motion to dismiss the claims of Petitioners Richard Glassman, Morris Jacobs, Michael Hall and Ignacio Reyes is unpublished. (Pet.App. 31a – 42a)

JURISDICTION

The judgment of the court of appeals was entered on August 7, 2008. (Pet.App. 31a – 42a) The court denied a petition for rehearing and rehearing en banc on September 30, 2008. (Pet.App. 43a-44a.) This Court has jurisdiction pursuant to 28 U.S.C. 1254(1).

RELEVANT PROVISIONS INVOLVED (see appendix)

STATEMENT

In its decision in this case the Ninth Circuit fails to recognize that discrimination causes harm and that the harm it causes is at least part of the injury an individual must know about before the statute of limitations begins to run on enforcement of the federal civil rights statutes, 42 U.S.C. 1981 and 1983.

Instead, the court categorizes race discrimination as "fault" making it irrelevant to accrual of the statute of limitations. " a...claim accrues when the plaintiff knew or

...should have known of the injury and the cause of that injury but is not deferred until the plaintiff has evidence of fault." (Pet.App.p.11)

According to the Ninth Circuit, an adverse employment event with no legal significance in itself, may initiate accrual of a cause of action for race discrimination, before the employee is even aware of a discriminatory motive. As a result, employees and other plaintiffs may lose their rights by losing their access to the courts.

An employee's alternative is to assume that every adverse event is motivated by discrimination and take action accordingly. As the Fifth Circuit Court of Appeals said in *Tucker v. United Parcel Service* 657 F.2d 724 (C.A.Ala.,1981),"It would be anomalous indeed if persons protected by the statute from racial discrimination are required to presume that they are being discriminated against." *Id.*,at p.726

It is a fundamental error to hold that discrimination or other constitutional violations cannot cause actual injury, but it is an error that many other circuits do not make. With its decision in this case the Ninth Circuit Court of Appeals has created an intractable conflict within the circuits; a situation that desperately needs clarification from the Supreme Court so that employees and others can know how best to proceed to protect their rights.

Procedural History

Petitioners were each a plaintiff in one of two lawsuits consolidated on appeal before the Ninth Circuit

Court of Appeals.[1] Both lawsuits alleged race and national origin discrimination in violation of 42 U.S.C. 1981 and 1983.[2] Both lawsuits, as they pertained to Petitioners, were dismissed on statute of limitations grounds, before reaching the merits of the claims.

In or around the year 2000 Petitioners took part in a competitive application process, along with many other applicants, for several positions as Electrical Transit System Mechanics at San Francisco's Metropolitan Transit Authority (MUNI). By the end of 2000 or mid-2001 all of the Petitioners knew or had reason to know that they had not been hired. Both the district court and the court of appeals refused to defer accrual of Petitioners' causes of action based on their delayed discovery of facts indicating discriminatory motive for not hiring them. Petitioners Alexei Zolotarev and Yevgeniy Skuratovsky filed their lawsuit in January, 2005, shortly after being informed that MUNI hired several unqualified Asian and Filipino applicants at the same time Petitioners had applied.[3]

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[1]Plaintiffs Alex Lukovsky, Muhammed Khan, Larry Mitchell, Antonio Huggins and Samson Asrat were already employed when they began experiencing race discrimination at MUNI. Therefore their claims came under the 1990 amendments to 42 U.S.C. 1981and were subject to a four year statute of limitations. Their cases were settled and they dismissed their claims with prejudice. (Pet.App,.p.16a,n.1)

[2]The statutes set forth at 42 U.S.C. 1981 and 1983 are sometimes referred to as federal civil rights statutes. Section 1981 enforces prohibitions against race discrimination in the making and enforcement of contracts and section 1983 enforces prohibitions against constitutional violations.

[3]The relevant portions of these two statutes do not incorporate a statute of limitations so they "borrow" the forum state's statute of

Petitioners Richard Glassman, Morris Jacobs, Michael Hall and Ignacio Reyes filed their lawsuit after receiving letters informing them of the allegations in the lawsuit brought by Petitioners Zolotarev and Skuratovsky. That letter was sent pursuant to an Order from the district court, in lieu of class certification. (Pet.App., p.5a)

In A Case Of First Impression For The Ninth Circuit The Court Treats Discriminatory Motive As Irrelevant To Accrual Of A Cause Of Action For Discrimination

In a case of first impression for the Ninth Circuit, a panel of the court of appeals held that accrual of a cause of action for violations of 42 U.S.C. 1981 and 1983 is not deferred until discovery of facts indicating race discrimination or discriminatory motive. Instead, the court held that discrimination is evidence of "fault" or "legal injury" which does not defer accrual of a federal

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limitations for personal injury and the forum state's tolling provisions. *Goodman v. Lukens Steel Co.*, 482 U.S. 656, 107 S.Ct. 2617, (1987) (forum state's statute of limitations for personal injury applies to 42 U.S.C. 1981), *Wilson v. Garcia*, 471 U.S. 261, 105 S.Ct. 1938, (1985) (forum state's statute of limitations for personal injury applies to 42 U.S.C. 1983). Despite borrowing the statute of limitations from the forum state, federal rules of accrual apply. *Wallace v. Kato*, 549 U.S. 384, 127 S.Ct. 1091, 1095 (2007).

Borrowing the forum state's statute of limitations means that the limitation periods for causes of action under these statutes vary from one year in California in 2000 to six years in Wisconsin. *Gray v. Lacke*, 885 F.2d 399, 407 (C.A.7,1989) *cert. denied* by *Lacke v. Gray*, 494 U.S. 1029, 110 S.Ct. 1476 1990). (applying Wisconsin's six year statute of limitations for injuries to personal rights).

cause of action. (Pet.App.,at pgs 11a-13a). The court held that the statute of limitations for race discrimination in violation of 42 U.S.C. 1981 accrues when the plaintiff receives notice of an adverse employment action, which the court called the "actual injury." The court held that no other facts were relevant to accrual of a cause of action for race discrimination under these statutes regardless of the fact that an adverse employment action is usually not illegal in itself and the discriminatory motive is sometimes not readily apparent.

In many cases, employees already have an indication of discriminatory motive by the time they are on notice of an adverse action. If so, there is no dispute over whether a cause of action accrues with notice of the adverse employment action or notice of the discriminatory motive. Both are apparent to the employee at the same time.

That was evidently the situation in *Delaware State College v. Ricks*, 449 U.S. 250, 101 S.Ct. 498 (1980) in which the Court held that a cause of action for discrimination under both Title VII and 42 U.S.C. 1981 accrues when the plaintiff receives notice of the adverse employment action. The facts of that case did not indicate that the plaintiff was unaware of the discriminatory motive when he was notified that he had been denied tenure. *Ricks* at p.252.

Similarly the Court's decision in *Ledbetter v. Goodyear Tire and Rubber Co. Inc.*, 550 U.S. 618, 127 S.Ct. 2162 (2007) held that the limitations period for filing an administrative complaint with the EEO accrued several years earlier, when an adverse employment action motivated by gender discrimination, took place. The

Court stressed, however, that Ledbetter did not argue application of the discovery rule - accrual of her cause of action at a later time, when she discovered facts indicating discriminatory motive. *Id.*, at p. 2177 n.10. Apparently, she too was aware of the discriminatory motive when the first adverse employment action took place.

In some cases, such as this one, discriminatory motive is not easily ascertained, particularly for job applicants who don't have a day to day history with the employer. If late discovery of the possibility of discrimination does not defer accrual of a cause of action under sections 1981 and 1983, enforcement may be made more difficult, if not impossible.

That reality is recognized in several circuits, decisions of which conflict with the Ninth Circuit's decision in both its reasoning and its conclusions. *See, e.g. Jones v. Alcoa, Inc.* 339 F.3d 359, 366 (5th Cir. 2003), *cert. denied* , 540 U.S. 1161, 124 S.Ct. 1173 (2004), (an employee's claim under 42 U.S.C. 1981accrues at the moment the employee believes or has reason to believe that he is the victim of discrimination).

The Ninth Circuit Has Improperly Conflated The Rule ForAdministrative Procedures Before The EEOC With The Rule For Filing Federal Litigation For Violations Of Sections 1981 And 1983

A consistent set of rules and a cogent reasoning process enables employees and other individuals to know what procedures will protect their rights. The Ninth Circuit's decision in this case does not provide either.

The Ninth Circuit based its decision on a series of cases interpreting the statutory definition for accrual of the time limits for filing administrative complaints with the Equal Employment Opportunity Commission (EEOC). (Pet.App.at p.8a-10a). That point of accrual is defined as "after the alleged unlawful employment practice occurred" at 42 U.S.C. 2000e-5(e) for Title VII and at 29 U.S.C. § 623(d) for the ADEA.

The cases cited by the court of appeals interpret that statutory language as referring to an adverse employment event regardless of whether or not the complainant has discovered discriminatory intent. That may be appropriate to accrual of the time limits for filing an administrative complaint to be followed by an agency investigation. *Thelen v. Marc's Big Boy Corp*, 64 F.3d 264, 268 (C.A.7,1995)(charge with an administrative agency places no duty of prefiling investigation because the purpose of the complaint is to uncover facts relevant to the case).

However, nothing about those statutes, that definition of accrual or the EEOC's administrative procedure is appropriate for application to 42 U.S.C. 1981 and 1983 because those civil rights statutes do not use EEOC investigative procedures and administrative complaints with the EEOC are not pre-conditions to filing lawsuits under sections 1981 and 1983. Allegations of discrimination in violation of those statutes go directly to federal litigation.

As the Court said in *EEOC v. Shell Oil Co.*, 466 U S. 54, 68, 104 S.Ct. 1621(1984),

"...a charge of employment discrimination is not

> the equivalent of a complaint initiating a lawsuit. The function of a Title VII charge, rather, is to place the EEOC on notice that someone (either a party claiming to be aggrieved or a Commissioner) believes that an employer has violated the title. The EEOC then undertakes an investigation into the complainant's allegations of discrimination. Only if the Commission, on the basis of information collected during its investigation, determines that there is "reasonable cause" to believe that the employer has engaged in an unlawful employment practice, does the matter assume the form of an adversary proceeding."*Id.*, at 68

The Ninth Circuit offered little or no explanation for conflating the definition of accrual of the time limits for filing an administrative complaint with the definition of accrual of the time limits for a federal lawsuit under 42 U.S.C. 1981 and 1983. The only explanation is set forth at footnote 3 of the decision.

> "Although the plaintiffs' actions in this case arise under §§ 1981, 1983, 1985, and 1986, we note that, of course, the majority of employment cases involve private employers. We therefore consider cases arising under other federal laws, such as Title VII or the ADEA, to be instructive. *See, e.g., Delaware State College v. Ricks*, (analyzing commencement of statute of limitations under both Title VII and Section 1981)." (Pet.App.,17a, n.3)

In fact, 42 U.S.C. 1981 also applies to private employers. The Court's decision in *Delaware State College v. Ricks*, suggest that administrative procedures for Title VII apply to sections 1981 and 1983 nor does. *Ricks*' analysis

of the point of accrual address a situation in which the plaintiff is not aware that the adverse employment event was discriminatory.

"Race Discrimination Is A Fundamental Injury To The Individual Rights Of A Person"

In *Goodman v. Lukens Steel Co.*, 482 U.S. 656, 107 S.Ct. 2617 (1987), explaining the choice of forum states' personal injury statutes for enforcement of section 1981 the Court quoted a court of appeals that said, "We have recognized that "racial discrimination ... is a fundamental injury to the individual rights of a person." *Id.* at p.661.

In *Wilson v. Garcia* 471 U.S. 261, 105 S.Ct. 1938 (1985) the Court cited the Fourth Circuit Court of Appeals which said,in relevant part, "In essence section 1983 creates a cause of action where there has been injury, under color of state law, to the person or to the constitutional or federal statutory rights which emanate from or are guaranteed to the person." The Court went on to say, "Had the 42d Congress expressly focused on the issue decided today, we believe it would have characterized § 1983 as conferring a general remedy for injuries to personal rights" *Id.*, at p.278.

In *Felder v. Casey* 487 U.S. 131, 108 S.Ct. 2302 (1988) The Court said,

> "Section 1983 creates a species of liability in favor of persons deprived of their federal civil rights by those wielding state authority. As we have repeatedly emphasized, 'the central objective of the Reconstruction-Era civil rights statutes ... is to ensure that individuals whose federal

> constitutional or statutory rights are abridged may recover damages or secure injunctive relief.' [citation omitted] Thus, § 1983 provides 'a uniquely federal remedy against incursions ... upon rights secured by the Constitution and laws of the Nation,' [citation omitted] and is to be accorded 'a sweep as broad as its language.' " *Id.*, at p.139

The Supreme Court Formulated The Rule of Discovery-Accrual In A Medical Malpractice Action

Deferring accrual of a cause of action until discovery of facts indicating an injury and the cause of the injury is frequently referred to as the rule of "discovery-accrual" first formulated in *United States v. Kubrick*, 444 U.S. 111, 100 S.Ct. 352, (1979). *Kubrick* applied discovery -accrual to a medical malpractice claim under the Federal Tort Claims Act (FTCA), holding that the two year limitation period for filing a notice of claim with the federal government did not accrue until the plaintiff had discovered, or in the exercise of reasonable diligence should have discovered, facts indicating both his injury and its cause. Accrual of the cause of action was not deferred, however, until the plaintiff discovered his legal rights. *Id.* at p.122.

Since *Kubrick* circuit courts have applied the discovery accrual rule to enforcement of other federal statutes, "...where plaintiffs face comparable problems in discerning the fact and cause of their injuries, [citation omitted]. Thus, any plaintiff who is blamelessly ignorant of the existence or cause of his injury should be accorded the benefits of the more liberal accrual standard." *Barrett v. United States* 689 F.2d 324 (CA2, 1982) *cert.*

denied, 462 U.S. 1131, 103 S.Ct. 3111, (1983).

Just as it is sometimes difficult to ascertain, within the statute of limitations, the physical injury and its medical cause resulting from medical malpractice, it is sometimes difficult to ascertain the race discrimination that is a fundamental injury to individual rights, within the statutory period.

The Ninth Circuit's Decision In This Case Applied The Wrong Standard For Equitable Estoppel

Ninth Circuit precedent holds that California's doctrine of equitable estoppel should be applied to state statutes of limitations borrowed by federal statutes. *Lucchesi v. Bar-O Boys Ranch*, 353 F.3d 691, 697. In this case, the court cited both the California and the federal doctrines but applied at least one of the elements of the federal doctrine. No other circuit has endorsed this confusing approach.

REASONS FOR GRANTING THE PETITION

The Supreme Court Has Not Had Occasion To Clarify This Issue

In its decision in this case the Ninth Circuit formulated the statement of the issue it was deciding as "...what must the plaintiffs 'discover' - that there has been an adverse action, or that the employer acted with discriminatory intent inperforming that act?"[4]

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[4]Petitioners do not take the position that for discovery -accrual an employee must discover *either* an adverse act or the employer's discriminatory intent in performing that act.

(Pet.App.at p. 7a-8a)

As the court noted, this was an issue of first impression for the Ninth Circuit, and one that the Supreme court has not had occasion to clarify either, citing Justice Connor's concurrence in *Nat'l R.R. Passenger Corp. v. Morgan*, 536 U.S. 101, 114 n. 7, 122 S.Ct. 2061,n.7, recognizing that "although Supreme Court precedents seem to establish a relatively simple 'notice' rule ..., courts continue to disagree on what the notice must be *of*." (Pet.App.at p.8a)

The Ninth Circuit's Decision In This Case Conflicts With Other Circuits

Several circuits, are in direct conflict with the Ninth Circuit's holding that discovery of discriminatory conduct is irrelevant to accrual of the statute of limitations on a discrimination lawsuit.

The position the Ninth Circuit takes with this case is in direct conflict with the Fifth Circuit's long held position, that the statue of limitations on a discrimination claim does not begin to run "until the facts that would support a cause of action are apparent to a reasonably prudent person with regard for his rights." *Calhoun v. Alabama Alcoholic Beverage Control Bd.*,705 F.2d 422 (C.A.Ala.,1983)(statute of limitations for a section 1983 claim for race discrimination did not accrue when African American plaintiffs were denied a liquor license, it accrued when a Caucasian couple was granted a license for the same location.)

In *Ramirez v. City of San Antonio*, 312 F.3d 178, 182 (5th Cir.2002), the Fifth Circuit said,

> "The limitations period does not begin when the employer commits an act that this Court would characterize as an adverse employment decision. Instead, an employee's claim accrues at the moment the employee believes (or has reason to believe) that he is the victim of discrimination"

Id at 182.

A 1981 decision, *Tucker v. United Parcel Service* 657 F.2d 724 (C.A.Ala., 1981) was based on facts similar to the key facts in this case but the Fifth Circuit gave it a completely different analysis.

In *Tucker*, African American seasonal workers were informed that they would not be called back to UPS. The district court dismissed their action on the ground that they had not filed an EEOC complaint within 180 days of being told that they would not be called back. A panel of the Fifth Circuit reversed, saying that being told they would not be called back was "an otherwise unexceptional decision" that would not put a reasonably prudent person on notice of race discrimination. *Id.*, at p.726.

The Fifth Circuit held that the 180 day limitation period did not begin to run until the plaintiffs learned that the Caucasian seasonal workers had been called back to UPS. The court said, "It would be anomalous indeed if persons protected by the statute from racial discrimination are required to presume that they are being discriminated against." *Id.*,at p.726 .

The Second Circuit set out the rule for accrual of civil rights actions in *Veal v. Geraci* 23 F.3d 722, 724 (2d

Cir. 1994), an action brought under 42 U.S.C. 1983. The court said, "A § 1983 claim accrues 'when the alleged conduct has caused the claimant harm and the claimant knows or has reason to know of the allegedly impermissible conduct and the resulting harm"(emphasis added) *See also,Paige v. Police Dept. of City of Schenectady*, 264 F.3d 197 (2d Cir. 2001) in which the Second Circuit refers to the same rule, citing *Veal.*

The Sixth Circuit also accrues the time limits for discrimination lawsuits from when the plaintiff knew or should have known of the discriminatory conduct. *See, e.g. Tolbert v. State of Ohio Department of Transport.* 172 F.3d 934, 939 (6th Cir. 1999) (primarily African American community's discrimination action accrued when they knew or should have known that the Caucasian community was getting sound barriers but that they were not.)

The Seventh Circuit set out the rule for accrual of civil rights actions in *Kelly v. City of Chicago,* 4 F.3d 509 (7th Cir. 1993). Section 1983 claims 'accrue when the plaintiff knows or should know that his or her constitutional rights have been violated." *Id.* at p. 511. *See also Lawshe v.Simpson* , 16 F.3d 1475 (7th Cir. 1994), "Section 1983 actions accrue when the plaintiff knows or should know that his or her constitutional rights have been violated." *Id.* at p.1478.

Notably, Wisconsin, which is in the 7th Circuit, applies its six year statute of limitations for injury to the person, to federal civil rights statutes. *Gray v. Lacke*, 885 F.2d 399, 407 (7th Cir. 1989)*Cert. Denied by Lacke v. Gray*, 494 U.S. 1029, 110 S.Ct. 1476 (1990), affirmed in *Farrell v. McDonough* 966 F.2d 279 (7th Cir. 1989), *Cert. Denied*, 506

U.S. 1084, 113 S.Ct. 1059, 122 (1993)

Equitable Tolling

Petitioners did not argue that their causes of action under 42 U.S.C. 1981 and 1983 were subject to equitable tolling but the Ninth Circuit's decision makes reference to the fact that certain cases interpreting the point of accrual for filing administrative complaints with the EEOC do not adjust those time limits based on the discovery- accrual rule, they adjust them based on equitable tolling of the statute of limitations - interrupting the statute of limitations after it has accrued. (Pet.App. At p.14a) To the extent that this observation may have influenced the Ninth Circuit's decision regarding accrual of Petitioners' claims, their comments regarding equitable tolling are relevant.

The cases cited by the court of appeals for applying equitable tolling instead of discovery-accrual are all interpreting a statutorily defined point of accrual. Adjustments to that statute are for the legislature, not the courts. *Baldwin County Welcome Center v. Brown*, 466 U.S. 147, 104 S.Ct. 1723, (1984) (Procedural requirements established by Congress for gaining access to the federal courts are not to be disregarded by courts out of a vague sympathy for particular litigants.) *Mohasco Corp. v. Silver*, 447 U.S. 807, 825, 100 S.Ct. 2486 ("We must also reject any suggestion that the EEOC may adopt regulations that are inconsistent with the statutory mandate. As we have held on prior occasions, its 'interpretation' of the statute cannot supersede the language chosen by Congress.")

Therefore, the point of accrual does not change but when equity so demands, the limitations period may be tolled. In *Zipes v. Transworld Airlines* . 455 U.S. 385, 398, 102 S.Ct. 1127 (1982) the Court held that the limitations period for filing an administrative complaint with the EEOC is subject to waiver and tolling when equity requires.

Thus the cases cited by the Ninth Circuit in support of equitable tolling rather than discovery-accrual, are distinguished from this case because 42 U.S.C. 1981 and 1983 are not subject to a statutorily defined definition of accrual of the statute of limitations.

THE NINTH CIRCUIT'S APPLICATION OF EQUITABLE ESTOPPEL CHANGES THE ELEMENTS OF THE CALIFORNIA DOCTRINE AND IN THAT WAY CONFLICTS WITH SUPREME COURT AUTHORITY

The court of appeals' analysis of equitable estoppel in this case is confused and confusing because it cites both the California's doctrine of equitable estoppel and a recent interpretation of the federal doctrine which includes one more limiting element than California does.

As federal statutes that "borrow" a statute of limitations from the forum state, 42 U.S.C. 1981 and 1983 also borrow the forum state's doctrines of tolling, revival and application, when not in conflict with federal law. *Wilson v. Garcia*, 471 U.S. at 269, n. 17, 105 S.Ct. 1038 (1985).

Ninth Circuit decisions have applied the California doctrine of equitable estoppel to federal civil rights

statues as in *Lucchesi v. Bar-O Boys Ranch*, 353 F.3d 691, 697 (9th Cir. 2003) and *Pesnell v. Arsenault*, 543 F.3d 1038, 1043, n.4 {9th Cir. 2008)(remand for consideration of California's statute of limitations, equitable tolling and equitable estoppel to *Bivens* action.). California also applied California's doctrine of equitable estoppel to an action under 42 U.S.C. 1983 in *Javor v. Taggert*, 98 Cal. App.4th 795,804 (2002)(California case applying California's equitable estoppel doctrine to action brought under 42 U.S.C. 1983).

The Ninth Circuit's decision in this case, however, changed California law by adding one more, restrictive element that does not exist in the California doctrine.

The court made its decision on the ground that Petitioners did not point to some active conduct by the defendant "...above and beyond the wrongdoing upon which the plaintiff's claim is filed, to prevent the plaintiff from suing in time." (Pet.App.,at p.15a)

A recent California Supreme court decision, *Atwater Elementary School Dist. v. California Department of General Services*. 41 Cal. 4th 227, 232-33 (2007) quoting from *Benner v. Industrial Acc. Comm.*(1945) 26 Cal. 2d. 346, 349-50, describes the California doctrine of equitable estoppel and it does not require conduct above and beyond the wrongdoing upon which the plaintiff's claim is filed.

> "To create an equitable estoppel 'it is enough if the party has been induced to refrain from using such means or taking such action as lay in his power, by which he might have retrieved his position and saved himself from loss.'...where delay

> in commencing action is induced by the conduct of the defendant, it cannot be availed of by him as a defense."

Id. at 232-33. *See also, Vu v. Prudential Property & Casualty, Ins. Co.* (2001) 26 Cal.4th 1142, 1152-53, "An estoppel may arise although there was no designed fraud on the part of the person sought to be estopped."

Circuit courts do not have the power to reconsider state law that the state's own Supreme Court has formulated and they cannot change the law without authorization from the state Supreme Court. *Moore v. Illinois Central R.R. Co.*, 312 U.S. 630, 633, 61 S.Ct. 754, (1941), *overruled on an unrelated point by Andrews v. Louisville & Nashville R.R. Co.*, 406 U.S. 320, 326, 92 S.Ct. 1562, 32 L.Ed.2d 95 (1972),

CONCLUSION

For the above and foregoing reasons, Petitioners respectfully request the issuance of a writ of certiorari to the United States Court of Appeals for the Ninth Circuit.

Respectfully submitted:

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(any footnotes trail end of each document)
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 06-16665,

ALEX LUKOVSKY; MUHAMMED KHAN; LARRY MITCHELL; ANTONIO HUGGINS; SAMSON ASRAT,
Plaintiffs,

and

ANATOLIY ZOLOTAREV; YEVGENIY SKURATOVSKY, individually and on behalf of class members,
Plaintiffs-Appellants,

v.

CITY AND COUNTY OF SAN FRANCISCO; JOHN SADORRA; RENATO SOLOMON; VERNON CRAWLEY; MICHAEL ELLIS; DORIS LANIER,
Defendants-Appellees.

No. 06-16946

RICHARD GLASSMAN; MORRIS JACOBS; MICHAEL HALL; IGNACIO REYES, Plaintiffs-Appellants,

v.

CITY AND COUNTY OF SAN FRANCISCO; ELSON HAO; JIM WACHOB; ALAN DEGUZMAN; TOM HIDAYAT,
Defendants-Appellees.

May 13, 2008, Argued and Submitted, San Francisco, California

August 7, 2008, Filed

Appeal from the United States District Court for the Northern District of California. D.C. No. CV-05-00389-WHA. D.C. No. CV-06-02304-WHA. William H. Alsup, District Judge, Presiding.

Opinion by Judge Hawkins.

COUNSEL: Edith J. Benay, San Francisco, California, for the plaintiffs-appellants.

Jonathan C. Rolnick, City of San Francisco, San Francisco, California, for the defendants-appellees.

JUDGES: Before: Diarmuid F. O'Scannlain, Michael Daly Hawkins, and M. Margaret McKeown, Circuit Judges.

OPINION

HAWKINS, Circuit Judge:

These consolidated appeals involve suits against the City and County of San Francisco, San Francisco Municipal Transportation Agency ("MUNI"), and various individual defendants (collectively,

"Defendants") for race and national origin discrimination in violation of 42 U.S.C. §§ 1981, 1983, 1985 & 1986. Plaintiffs allege that Defendants discriminated against them by giving preferential hiring treatment to Asian and Filipino workers. We do not consider the merits of the plaintiffs' allegations, however, as the only issue before us is whether their claims are barred by the statute of limitations, as the district court found. We agree with the district court that (1) the cause of action accrued and the statute of limitations began to run when the plaintiffs received notice they would not be hired, and (2) equitable estoppel does not prevent the Defendants from asserting a statute of limitations defense. Accordingly, we affirm the district court in all respects.

FACTS AND PROCEDURAL HISTORY

Zolotarev, Appeal No. 06-16665:

In 1999 through 2000, MUNI advertised various provisional positions for electrical transit system mechanics ("7371 positions"). MUNI considered applications and written-performance tests, as well as some in-person interviews. In October 2000, MUNI obtained funding to hire several permanent 7371 mechanics, and issued a job announcement for these permanent positions. The announcement contained the following requirement:

> Verification (proof) of all experience and/or training needed to qualify must be submitted with the application . . . . Verification may be waived if impossible to obtain. The applicant must submit a signed statement with the

> application explaining why verification cannot be obtained . . . Failure to submit the required verification or request for waiver in a timely manner may result in the rejection of the application.

Two plaintiffs, Anatoliy Zolotarev and Yevgeniy Skuratovsky, filed their initial complaint in January 2005, together with several other plaintiffs who are not a party to this appeal ("the Lukovsky action").[1] These Plaintiffs alleged that the Defendants discriminated on the basis of race--giving preferential treatment to Asian and Filipino applicants for the provisional and permanent 7371 positions by hiring Asian and Filipino applicants who did not meet the minimum qualifications. They also alleged Defendants failed to provide information about the 7371 openings to potential candidates who were not Asian or Filipino.

Plaintiff Skuratovsky applied for two provisional 7371 positions in 1999 and 2000, but was ranked below the hiring cutoff for both. He applied for a permanent 7371 position in October 2000, but failed to include an experience verification or seek a waiver of the requirement. He received notice in November 2000 that his application had been disqualified for failure to provide the verification.

Plaintiff Zolotarev did not apply for any of the 7371 positions in 1999 or 2000, However, he had previously applied for a similar mechanic position in 1998, and claims to have been informed that his application "would remain in the active file should a vacancy occur in the Division." He was not contacted by MUNI about any jobs in 2000 or 2001.

The Lukovsky plaintiffs sought and were denied class certification. The court's order, however, permitted the plaintiffs' counsel to send letters to other individuals who could potentially have similar claims, so that all such claims might be tried by the same judge. The district court then granted summary judgment in favor of the Defendants as to Skuratovsky and Zolotarev on statute of limitations grounds, concluding that these plaintiffs knew or should have known of their injury--i.e., that they had not been hired for the permanent position--for several years before they filed their complaint.

Glassman, Appeal No. 06-16946:

Four plaintiffs--Richard Glassman, Morris Jacobs, Michael Hall and Ignacio Reyes--were applicants for 7371 positions with MUNI during 2000. Glassman applied in June 2000 and was disqualified in November 2000, purportedly for failing to provide a written verification of his prior work experience. Jacob's application was rejected in October 2000 on the same grounds, as was Reyes's application in November 2000. Hall applied for a 7371 position in October 2000 and claims he never received notification that his application was rejected.

These plaintiffs received letters regarding the Lukovsky action in January-February 2006 and filed their complaint on March 31, 2006, alleging that Defendants gave preferential treatment to Asian and Filipino applicants who did not meet the minimum qualifications for the job. They also contend Defendants modified the requirements for 7371 positions in late 2000 to purportedly make it easier to hire Asian and

Filipino applicants, and that the Defendants failed to provide sufficient information about the 7371 positions to non-Asian and non-Filipino candidates.

The district court granted the Defendants' motion to dismiss the complaint under Rule 12 (b)(6) of Civil Procedure on statute of limitations grounds, concluding that the plaintiffs had notice of their injury when they received the notices informing them they were not being hired, or, in the case of Hall, by early 2001 (when those accepted for the position would have reported to work).

STANDARD OF REVIEW

We review de novo the district court's dismissal on statute of limitations grounds, *Mann v. American Airlines*, 324 F.3d 1088, 1090 (9th Cir. 2003), and the court's ruling on summary judgment, *General Bedding Corp. v. Echevarria*, 947 F.2d 1395, 1396 (9th Cir. 1991). We review for an abuse of discretion the district court's decision that defendants should not be equitably estopped from asserting a statute of limitations defense. *See Santa Maria v. Pac. Bell*, 202 F.3d 1170, 1175 (9th Cir. 2000).

DISCUSSION

I. When did Plaintiffs' claims accrue?

When, as here, a federal civil rights statute does not include its own statute of limitations, federal courts borrow the forum state's limitations period for personal injury torts, which the parties agree in this case is one year under California law. *Taylor v. Regents of Univ.*

Of Cal., 993 F.2d 710, 711 (9th Cir. 1993) (applying one-year limitations period to claims brought pursuant to 42 U.S.C. §§ 1981, 1983 and 1985).[2] Although California law determines the *length* of the limitations period, federal law determines when a civil rights claim *accrues*. *Olsen v. Idaho State Bd. of Med.*, 363 F.3d 916, 926 (9th Cir. 2004) (quoting *Morales v. City of Los Angeles*, 214 F.3d 1151, 1153-54 (9th Cir. 2000)). Accrual is the date on which the statute of limitations begins to run; under federal law, a claim accrues "when the plaintiff knows or has reason to know of the injury which is the basis of the action." *Id.* (quoting *Two Rivers v. Lewis*, 174 F.3d 987, 991 (9th Cir. 1999)).

Plaintiffs argue that their claims did not accrue until they knew both that they were not being hired *and* of the Defendants' alleged discriminatory intent. In other words, plaintiffs contend that knowledge of "injury" includes both the actual injury (failure to hire) and the legal wrong (racial discrimination). The Zolotarev plaintiffs assert they had no reason to know of the legal injury until informed years later by a MUNI employee that allegedly unqualified Asians and Filipinos had been hired; the Glassman plaintiffs claim they had no reason to know of the Defendants' discriminatory conduct until they received the letter informing them of the Zolotarev lawsuit.

Plaintiffs frame their argument in terms of the "discovery rule," which postpones the beginning of the limitations period from the date the plaintiff is actually injured to the date when he discovers (or reasonably should discover) he has been injured. *See O'Connor v. Boeing North Am., Inc.*, 311 F.3d 1139, 1147 (9th Cir. 2002). However, this rule is already incorporated into

federal accrual law. *See Cada v. Baxter Healthcare Corp.*, 920 F.2d 446, 450-51 (7th Cir. 1990). The real question, as noted above, is what do we mean by "injury," that is, what must the plaintiffs "discover"--that there has been an adverse action, or that the employer acted with discriminatory intent in performing that act?

This issue has not been expressly addressed in this circuit. *See Lyons v. England*, 307 F.3d 1092, 1107 n.9 (9th Cir. 2002) (noting that prior cases dealing with accrual under Title VII had not resolved "the more subtle question of when the date of a plaintiff's notice that the act was discriminatory, and not the date of the act's occurrence" should be the preferred date for commencing the statute of limitations).[3] Nor has the Supreme Court had occasion to clarify the issue. *See Nat'l R.R. Passenger Corp. v. Morgan*, 536 U.S. 101, 114 n.7, 122 S. Ct. 2061, 153 L. Ed. 2d 106 (2002); *id.* at 123-24 (O'Connor, J., concurring) (recognizing that "although Supreme Court precedents seem to establish a relatively simple 'notice' rule . . ., courts continue to disagree on what the notice must be *of*") (quotations omitted) (emphasis in original); *but see id.* at 114 (noting that discrete acts, such as termination and refusal to hire, are easy to identify).

However, numerous other circuits have explicitly addressed this precise question in a variety of employment contexts, and have concluded that the claim accrues upon awareness of the actual injury, i.e., the adverse employment action, and not when the plaintiff suspects a legal wrong. For example, in *Oshiver v. Levin, Fishbein, Sedran & Berman*, 38 F.3d 1380 (3d Cir. 1994), the court explained:

> The question arises whether a plaintiff's discovery of the actual, as opposed to the legal, injury is sufficient to trigger the running of the statutory period. In other words, does the statutory period begin to run upon a plaintiff's learning that he or she has been discharged from employment, for example, or does it begin to run only after a plaintiff comes to realize that the discharge constituted a legal wrong? We have in the past stated that a claim accrues in a federal cause of action upon awareness of the actual injury, not upon awareness that this injury constitutes a legal wrong.

Id. at 1386. The Sixth Circuit similarly opined in *Amini v. Oberlin College*, 259 F.3d 493 (6th Cir. 2001):

> Amini learned of his injury when Oberlin informed him that he would not be hired for its vacant statistics position. As stated, the proper focus for purposes of determining the commencement of the [statute of] limitations period is on the discriminatory act itself and when that act was communicated to the plaintiff. Amini's attempt to stop the running of the [] clock until he discovered the facts that led him to suspect discrimination is best addressed as a question of equitable tolling.

Id. at 500; *see also Thelen v. Marc's Big Boy Corp.*, 64 F.3d 264, 267 (7th Cir. 1995) (claim accrued upon termination, even though plaintiff did not discover he was replaced by younger employee until later; "[a] plaintiff's action accrues when he discovers that he has been injured, not when he determines that the injury

was unlawful"); *Dring v. McDonnell Douglas Corp.*, 58 F.3d 1323, 1327-28 (8th Cir. 1995) (limitations period runs from date discriminatory act occurs, not when victim first perceives discriminatory motive); *Hulsey v. Kmart, Inc.*, 43 F.3d 555, 558-59 (10th Cir. 1994) ("notice or knowledge of discriminatory motivation is not a prerequisite for a cause of action to accrue . . . . it is the knowledge of the adverse employment decision itself that triggers the running of the statute of limitations"); *Hamilton v. 1st Source Bank*, 928 F.2d 86, 88-89 (4th Cir. 1990) ("To the extent that notice enters the analysis, it is the notice of the employer's actions, *not* the notice of a discriminatory effect or motivation, that establishes the commencement of the pertinent filing period."); *Merril v. S. Methodist Univ.*, 806 F.2d 600, 604-05 (5th Cir. 1986) (rejecting argument that court should focus on the date the victim perceives a discriminatory motive rather than the actual date of the act itself).

We find these opinions persuasive. Moreover, they are consistent with the Supreme Court's opinion in *Ricks*, which involved an action under Title VII and Section 1981, and focused on when the plaintiff became aware of the adverse employment decision. *Ricks* concluded the statute of limitations under both commenced when the adverse decision was communicated to Ricks, even though the consequences of the action were not fully felt at that time. 449 U.S. at 258-59, 261-62; *see also Ledbetter v. Goodyear Tire & Rubber Co., Inc.*, 127 S. Ct. 2162, 167 L. Ed. 2d 982 (2007). In this circuit, we have similarly emphasized the plaintiff's awareness of the adverse employment action as critical to the accrual analysis. *See Olsen*, 363 F.3d at 927 (section 1983 claim accrued on date when plaintiff received letter notifying

her that medical board was denying her license reinstatement).

In addition, this view also seems analogous to cases in this circuit under the Federal Tort Claims Act ("FTCA"). For example, we have held that an FTCA claim accrues when the plaintiff knew or in the exercise of reasonable diligence should have known of the injury and the cause of that injury, but is not deferred until the plaintiff has evidence of fault. *Davis v. United States*, 642 F.2d 328, 331 (9th Cir. 1981) (citing *United States v. Kubrick*, 444 U.S. 111, 100 S. Ct. 352, 62 L. Ed. 2d 259 (1979)). Thus, in *Davis*, we determined that the statute of limitations accrued when plaintiff knew he had been injured and that the likely cause was the Sabin vaccine; however, accrual was not further deferred until plaintiff had reason to suspect governmental negligence. *Id.* at 331. We noted that once a plaintiff knows that harm has been done to him, he must "determine within the period of limitations whether to sue or not, which is precisely the judgment that other tort claimants must make." *Id.* (internal quotation marks omitted).

To counter this wealth of authority, plaintiffs point to language in *Aronsen v. Crown Zellerbach*, 662 F.2d 584, 593 (9th Cir. 1981), in which we stated that in ADEA suits, the limitations period is activated once "the employee knows or should know that an unlawful employment practice has been committed." In the context of the case, however, the clear focus of this sentence is on *when* plaintiff received notice of his termination--on the date the termination was informally communicated to him, or when he was officially terminated and his paychecks ceased nearly a

year later. *Id.* at 585-86. We went on to note in passing that receipt of "written notice of termination would clearly shorten the inquiry concerning the employee's knowledge of termination date (though not necessarily knowledge of an unlawful employment practice)." *Id.* at 593-94. We did not decide the issue presented in this case, however, because we remanded the case for further proceedings in light of the factual debate about when Aronsen actually knew of his termination. *Id.* at 594.

Plaintiffs also attempt to rely on language in *Morales v. City of Los Angeles*, in which we quoted a Second Circuit case to say that a "claim accrues when the alleged conduct has caused the claimant harm and the claimant knows or has reason to know of the allegedly impermissible conduct and the resulting harm." 214 F.3d at 1154 (quoting *Veal v. Geraci*, 23 F.3d 722, 724 (2d Cir. 1994)). However, the holding of *Morales* (and *Veal* for that matter) was limited to the *finality* of the harm; we concluded that the plaintiffs had been injured when they lost their lawsuits, not when the losses were subsequently upheld on appeal. *See id.* Again, we had no occasion to consider or decide the question we now face.

These stray remarks in cases that did not actually confront the issue before us do not compel us to disagree with our sister circuits that a claim accrues under federal law when the plaintiff knows or has reason to know of the actual injury. *See, e.g., Inlandboatmens Union of Pac. v. Dutra Group*, 279 F.3d 1075, 1081 (9th Cir. 2002) (later panel not bound by tangential remark made in earlier case). In this case, as the district court found, the claim accrued when the

plaintiffs received notice they would not be hired (or, in the case of plaintiffs Zolotarev and Hall, when they should have realized they had not been hired for the position). *Cf. Grimes v. City and County of San Francisco*, 951 F.2d 236, 239 (9th Cir. 1991) (termination is discrete act that triggers running of statute of limitations); *see also Morgan*, 536 U.S. at 114 ("Discrete acts such as . . . refusal to hire are easy to identify."). At this point, the plaintiffs knew they had been injured and by whom, *see* Kubrick, 444 U.S. at 113, even if at that point in time the plaintiffs did not know of the legal injury, i.e., that there was an allegedly discriminatory motive underlying the failure to hire.[4]

II. Equitable Tolling/Equitable Estoppel

Notwithstanding the foregoing, there are two doctrines which may apply to extend the limitations period or preclude a defendant from asserting the defense--equitable tolling and equitable estoppel. The federal version of these doctrines is concisely explained in *Johnson v. Henderson*, 314 F.3d 409 (9th Cir. 2002). "Equitable tolling" focuses on "whether there was excusable delay by the plaintiff: If a reasonable plaintiff would not have known of the existence of a possible claim within the limitations period, then equitable tolling will serve to extend the statute of limitations for filing suit until the plaintiff can gather what information he needs." *Id.* at 414 (quotation omitted). Equitable estoppel, on the other hand, focuses primarily on actions taken by the *defendant* to prevent a plaintiff from filing suit, sometimes referred to as "fraudulent concealment." *Id.* (citing *Cada v. Baxter Healthcare Corp.* 920 F.2d 446, 450-51 (7th Cir. 1990)).

The plaintiffs in this case have expressly disavowed any reliance on equitable tolling. We therefore leave for another day the consideration of what circumstances would justify equitable tolling of the statute of limitations in this type of case. n5 However, they do argue that Defendants should be equitably estopped from asserting a statute of limitations defense because, they contend, the Defendants' misrepresentations about requiring written verification of qualifying experience concealed that they were hiring unqualified Asian and Filipino applicants instead.

Under California law, equitable estoppel requires that:

> (1) the party to be estopped must be apprised of the facts; (2) that party must intend that his or her conduct be acted on, or must so act that the party asserting the estoppel had a right to believe it was so intended; (3) the party asserting the estoppel must be ignorant of the true state of facts; and (4) the party asserting the estoppel must reasonably rely on the conduct to his or her injury.

Honig v. San Francisco Planning Dep't, 127 Cal. App. 4th 520, 529, 25 Cal. Rptr. 3d 649 (2005). California equitable estoppel is thus similar to and not inconsistent with federal common law, as both focus on actions taken by the defendant which prevent the plaintiff from filing on time. *See Santa Maria*, 202 F.3d at 1176.

The primary problem with plaintiffs' argument is that their alleged basis for equitable estoppel is the same as their cause of action. As we have previously explained,

the plaintiff must point to some fraudulent concealment, some active conduct by the defendant "*above and beyond* the wrongdoing upon which the plaintiff's claim is filed, to prevent the plaintiff from suing in time." *Guerrero v. Gates*, 442 F.3d 697, 706 (9th Cir. 2006) (quoting *Santa Maria*, 202 F.3d at 1176-77) (emphasis added).

The Seventh Circuit persuasively explains why this rule must be the case:

> If [defendant] had told [plaintiff] that it would not plead the statute of limitations as a defense to any suit for age discrimination that he might bring, this would be a case for equitable estoppel; so also if [defendant] had presented [plaintiff] with forged documents purporting to negate any basis for supposing that [plaintiff's] termination was related to his age. [Plaintiff] tries to bring himself within the doctrine by contending that [stated reason for termination] was a ruse to conceal the plan to fire him because of his age. This merges the substantive wrong with the tolling doctrine . . . . It implies that a defendant is guilty of fraudulent concealment unless it tells the plaintiff, "We're firing you because of your age." It would eliminate the statute of limitations . . . .

Cada, 920 F.2d at 451.

The plaintiffs in this case make a similar attempt to circumvent the requirements of equitable estoppel. They do not point to any misrepresentation by the Defendants that concealed the composition of the

applicant pool, the qualifications of those actually hired, or any promise by which the Defendants discouraged plaintiffs from timely asserting their rights. The district court properly denied the claim for equitable estoppel. n6

CONCLUSION

The district court correctly determined that the plaintiffs' claims accrued at the time they received notice they would not be hired or, in the case of plaintiffs Zolotarev and Hall, when a reasonable person would have realized he had not been hired. The plaintiffs in this case have waived any claim for equitable tolling and the district court did not abuse its discretion in rejecting the plaintiffs' claim for equitable estoppel, as the plaintiffs did not allege any fraudulent concealment or misrepresentation above and beyond the actual basis for the lawsuit.

AFFIRMED.

1The remaining plaintiffs dismissed their claims with prejudice.

2Section 1981 was amended in 1990 to include a four-year limitations period for certain actions; however, this period does not apply to those actions which were cognizable under the pre-1990 version, such as plaintiffs' failure to hire claim. *See Cholla Ready Mix, Inc. v. Civish*, 382 F.3d 969, 974 n.5 (9th Cir. 2004); *Patterson v. McLean Credit Union*, 491 U.S. 164, 180-82, 109 S. Ct. 2363, 105 L. Ed. 2d 132 (1989).

3Although the plaintiffs' actions in this case arise under §§ 1981, 1983, 1985, and 1986, we note that, of course, the majority of employment cases involve private employers. We therefore consider cases arising under other federal laws, such as Title VII or the ADEA, to be instructive. *See, e.g., Delaware State College v. Ricks*, 449 U.S. 250, 101 S. Ct. 498, 66 L. Ed. 2d 431 (1980) (analyzing commencement of statute of limitations under both Title VII and Section 1981).

4We note that various other circuits have also considered whether a reasonable plaintiff should have suspected discrimination and discovered the legal wrong within the limitations period as relevant to the issue of equitable tolling. *See Amini*, 259 F.3d at 501; Thelen, 64 F.3d at 267-68 and *Dring*, 58 F.3d at 1328-29. As discussed in Section II below, we are not called upon to decide this issue today.

5The plaintiffs' position seems driven by California's equitable tolling principles. We note, however, that California tolling law only applies to the extent it is not inconsistent with federal law. *Azer v. Connell*, 306 F.3d 930, 936 (9th Cir. 2002). The plaintiffs do not argue that California's requirements are inconsistent with federal equitable tolling principles, and we decline to sua sponte reach issues which have not been raised.

6The Zolotarev plaintiffs also argue that, if their claims were timely, the district court abused its discretion by denying them leave to file a Third Amended Complaint. We deny this claim as moot.

No. C 05-00389 WHA
UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT
OF CALIFORNIA

ALEX LUKOVSKY, MUHAMMED KHAN, LARRY MITCHELL, ANTONIO HUGGINS, SAMSON ASRAT, ANATOLIY ZOLOTAREV, and YEVGENIY SKURATOVSKY, Plaintiffs,

v.

CITY AND COUNTY OF SAN FRANCISCO, SAN FRANCISCO MUNICIPAL TRANSPORTATION AGENCY, JOHN SADORRA, RENATO SOLOMON, VERNON CRAWLEY, MICHAEL ELLIS, and DORIS LANIER, Defendants.

July 17, 2006, Decided
July 17, 2006, Filed

JUDGES: WILLIAM ALSUP, UNITED STATES DISTRICT JUDGE.

OPINION

***

INTRODUCTION

In this employment-discrimination action, defendants

move for summary adjudication of the claims under 42 U.S.C. 1981 brought by plaintiffs Anatoliy Zolotarev and Yevgeniy Skuratovsky. Defendants make this motion on the grounds that Zolotarev and Skuratovsky's Section 1981 claims are barred by the statute of limitations. This order finds the claims are so barred. Defendants' motion, therefore, is **GRANTED.**

STATEMENT

In December 1999, San Francisco's Municipal Transportation Agency ("MUNI") issued a job announcement for provisional positions as electrical transit system mechanics ("7371 positions"). 59 people submitted applications in response. MUNI considered the applications and written-performance tests. For the top thirty candidates, in-person interviews were taken. MUNI then compiled a final list ranking the remaining candidates. As of March 2000, MUNI secured funding to hire the top thirteen candidates.

In June 2000, MUNI received authorization to hire six more people for the provisional 7371 positions. MUNI reevaluated the applications of the remainder of the earlier pool of candidates who were interviewed but not hired. After reviewing the candidates' qualifications and conducting new interviews, a new ranking of applicants was prepared.

In July 2000, MUNI issued another job announcement, seeking additional applications for provisional 7371 positions. 57 people applied. MUNI again ranked these applicants. MUNI received funding to hire eight of these candidates for provisional 7371 positions.

In October 2000, MUNI obtained funding to hire permanent 7371 mechanics. MUNI issued a job announcement seeking applicants for the permanent positions. The announcement was distributed at various city offices, local unions, community organizations, and the State Employment Development Department's job-services office. The announcement contained the following experience-verification requirement (Tharyil Decl. Exh. A) (emphasis in original):

> Verification (proof) of all experience and/or training needed to qualify must be submitted with the application. . . . Verification may be waived if impossible to obtain. The applicant must submit a signed statement with the application explaining why verification cannot be obtained. Waiver requests will be considered on a case-by-case basis. **Failure to submit the required verification or request for waiver in a timely manner may result in the rejection of the application.**

Out of the pool of applicants for the permanent 7371 positions, MUNI created a final list of eligible candidates on January 8, 2001. The final eligibles list remained in use for one year to draw permanent 7371 mechanics.

Plaintiff Yevgeniy Skuratovsky is a Jewish man originally from Russia (formerly part of the Soviet Union). He worked on the maintenance and repair of submarines for fifteen years while living in Russia. Skuratovsky applied for a provisional 7371 position in response to the December 1999 listing. On the basis of

his application, test and interview, he was ranked fourteenth, one below the hiring cutoff (Hao Decl. Exh. E).[1] Skuratovsky was interviewed again in conjunction with the June 2000 round of hiring. In that round, he was ranked tenth, four spots too low to be hired (Jensen Decl. Exh. D). Skuratovsky did not apply for the provisional 7371 position in response to the July 2000 listing. He did submit an application for a permanent 7371 position in response to the October 2000 listing. Skuratovsky, however, failed to include an experience verification with his application or seek waiver of the verification requirement. He received notice in November 2000 that his application was disqualified for failure to provide the verification and thus he did not make it onto the eligibles list for permanent positions (Vandiver Decl. Exh. C).

Plaintiff Anatoliy Zolotarev is a Jewish man originally from Belarus (formerly part of the Soviet Union). He worked in road construction in Belarus for seven years. Zolotarev did not apply for any 7371 positions, provisional or permanent, in response to any of the above listings. Zolotarev applied for a similar mechanic position (a "7409 position") in 1998. Although he apparently passed the test for the 7409 position, he was not hired for that position. He allegedly was informed that his application would "remain in the active file should a vacancy occur in the Division" (Zolotarev Decl. Par 3). Zolotarev contended that he was either misled or not informed of the opportunity to apply for the various provisional or permanent 7371 positions described above. According to Zolotarev, "I never contacted by MUNI about jobs in 2000 or 2001. I was never even told that MUNI would no longer keep my application on file for future vacancies" (*id.* Par 5).

On January 26, 2005, the above-captioned plaintiffs (including Zolotarev and Skuratovsky) filed their initial complaint, which they have since amended twice. In their third claim for relief, plaintiffs alleged a deprivation of their civil rights under Section 1981 by all defendants. [2] Underlying this claim, plaintiffs alleged that defendants discriminated on the basis of race by giving preferential treatment to Asian and Filipino applicants for the provisional and permanent 7371 positions. Plaintiffs contended that MUNI hired Asian and Filipino applicants who did not meet the minimum qualifications for the positions. Plaintiffs also contended that defendants failed to make information about 7371 openings available to potential candidates, such as Zolotarev, who were not Asian or Filipino. This failure allegedly included flawed information about permanent openings in 2001, and about the provisional 7371 positions offered in 2000 that ultimately could have led to permanent positions. On January 17, 2006, this Court issued an order denying class certification. The claims were thus to proceed individually. Defendants now move for partial summary judgment solely as to the Section 1981 claims of plaintiffs Zolotarev and Skuratovsky.

ANALYSIS

Summary judgment is proper where the pleadings, discovery and affidavits show "that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." FRCP 56(c). The moving party has the initial burden of production to demonstrate the absence of any genuine issue of material fact. *Playboy Enters., Inc. v. Netscape Communic'ns Corp.*, 354 F.3d 1020, 1023-24 (9th Cir.

2004). Once the moving party meets its initial burden, the nonmoving party must "designate specific facts showing there is a genuine issue for trial." *Celotex Corp. v. Catrett*, 477 U.S. 317, 323-24, 106 S. Ct. 2548, 91 L. Ed. 2d 265 (1986). "If the moving party shows the absence of a genuine issue of material fact, the non-moving party must go beyond the pleadings and 'set forth specific facts' that show a genuine issue for trial." *Leisek v. Brightwood Corp.*, 278 F.3d 895, 898 (9th Cir. 2002) (citation omitted).

1. STATUTE OF LIMITATIONS FOR SECTION 1981.

The parties both agree that the applicable statute of limitations for Skuratovksy and Zolotarev's Section 1981 claim is one year (Opp. 8). Where, as here, the relevant statute does not contain its own statute of limitations, "courts borrow the most appropriate state statute of limitations." *Cholla Ready Mix, Inc. v. Civish*, 382 F.3d 969, 974 (9th Cir. 2004). [3] "California's one-year statute of limitations for personal injury actions governs claims brought pursuant to 42 U.S.C. §§ 1981, 1983, and 1985." *Taylor v. Regents of Univ. of Cal.*, 993 F.2d 710, 711 (9th Cir. 1993).

The only issues, therefore, are whether Skuratovsky and Zolotarev's Section 1981 claims accrued more than one year before they filed their initial complaint, January 26, 2005, and if so, whether the time bar was limited by a principle of equity.

2. ACCRUAL.

"Although state law determines the length of the

limitations period, federal law determines when a civil rights claim accrues." *Olsen v. Idaho State Bd. of Med.*, 363 F.3d 916, 926 (9th Cir. 2004) (internal citation omitted); *see also Delaware State College v. Ricks*, 449 U.S. 250, 259, 101 S. Ct. 498, 66 L. Ed. 2d 431 (1980). "[A] claim accrues when the plaintiff knows or has reason to know of the injury which is the basis of the action." *Olsen*, 363 F.3d at 926 (internal citation omitted). "[T]he question is when the operative decision was made, not when the decision is carried out." *Ibid.* (internal citation omitted); *see also Aronsen v. Crown Zellerbach*, 662 F.2d 584, 593 (9th Cir. 1981).

Plaintiffs argue that under *Vaughan v. Grijalva*, 927 F.2d 476, 480 (9th Cir. 1991), courts use state law for the question of when they should have known of the existence of their claims. Under California law, plaintiffs suggest, accrual is determined by the "discovery rule" - the date on which plaintiffs knew or should have know of their injury. Under *Olsen, supra*, it is an inaccurate statement of law that the accrual analysis in federal court "borrows" from state law. Yet the distinction is academic. Federal law builds in this "discovery rule," as was explained by a Seventh Circuit opinion relied on by both sides:

> Accrual is the date on which the statute of limitations begins to run. It is not the date on which the wrong that injures the plaintiff occurs, but the date - often the same, but sometimes later - on which the plaintiff discovers that he has been injured. *The rule that postpones the beginning of the limitations period from the date when the plaintiff is wronged to the date when he discovers he has been injured is the "discovery*

> *rule" of federal common law, which is read into statutes of limitations in federal-question cases* (even when those statutes of limitations are borrowed from state law) in the absence of a contrary directive from Congress. The discovery rule is implicit in the holding *of Ricks* that the statute of limitations began to run "at the time the tenure decision was made and communicated to Ricks."

Cada v. Baxter Healthcare Corp., 920 F.2d 446, 450 (7th Cir. 1990) (emphasis added) (internal citations omitted).

With these principles in mind, both plaintiff's claims undoubtedly accrued before January 26, 2005.

Plaintiff Skuratovsky was informed in November 15, 2000 that MUNI rejected his application for a permanent 7371 position (Vandiver Decl. Exh. C). That is the date of accrual here. Skuratovsky knew (or should have known) of the injury after learning of the rejection. *See Ricks*, 449 U.S. at 259 (claim accrued on day teacher notified his tenure was denied).

Plaintiff Zolotarev's claim accrued on or around October 2000 when the deadline for submitting applications for the permanent 7371 position ended. Zolotarev argues that his claims never accrued because he was never notified of a denial. But the reason Zolotarev never received any notice is because he never applied for *any* of the 7371 positions, provisional or permanent (Zolotarev Dep. 44). His potential candidacy for the permanent position was automatically "denied" on the deadline date listed in MUNI's advertisement of the position. He knew or should have

known that he would not be considered for a 7371 position at or around the passing of the deadline and certainly by the time he heard nothing from MUNI about his purportedly pending application.

3. EQUITABLE TOLLING.

Absent equity, the claims of both plaintiffs' were barred by late 2001. One question, therefore, is whether the statute of limitation was equitably tolled during the four years between the date of accrual and the date of the original complaint.

Plaintiff apparently concede that equitable tolling does not apply in this action (Opp. 15). To be thorough, however, "[i]n civil rights suits, this court applies state tolling rules as long as they 'are not inconsistent with federal law.'" *Guerrero v. Gates*, 442 F.3d 697, 706 n. 34 (9th Cir. 2006). Under California law, "these requirements control: timely notice and absence of prejudice to defendant and plaintiff's good faith and reasonable conduct." *Daviton v. Columbia/HCA Healthcare Corp.*, 241 F.3d 1131, 1137 (9th Cal. 2001) (citing *Addison v. State of California)*, 21 Cal.3d 313, 319, 146 Cal. Rptr. 224, 578 P.2d 941 (1978)).

Skuratovsky presents no issue of material fact as to the reasonable conduct he took to obtain the basic information about his Section 1981 claim. Skuratovsky gives no indication of what effort he expended to investigate the denial of his application in the period between November 2000 and 2004. At most, Skuratovsky indicates the "revelation" about possible discrimination "did not come to light until 2004 when [fellow plaintiff] Alex Lukovsky told him about the

possibility that Defendants had discriminated against him in 2000" (Opp. 12). That is simply an insufficient showing of diligence on a motion for summary judgment to find equitable tolling.

Likewise, Zolotarev gives no indication of what actions he took to investigate MUNI's failure to hire him (for a job for which he did not even investigate whether he had a pending application). He simply fails to rebut a finding of lack of reasonable diligence. [4]

4. EQUITABLE ESTOPPEL.

Plaintiffs argue defendants are equitably estopped from asserting the statute of limitations.

"Equitable estoppel, also termed fraudulent concealment, halts the statute of limitations when there is 'active conduct by a defendant, above and beyond the wrongdoing upon which the plaintiff's claim is filed, to prevent the plaintiff from suing in time.'" *Guerrero*, 442 F.3d at 706 (citing *Santa Maria v. Pac. Bell*, 202 F.3d 1170, 1176-77 (9th Cir.2000)). Under California law, the elements of equitable estoppel are:

> (1) the party to be estopped must be apprised of the facts; (2) that party must intend that his or her conduct be acted on, or must so act that the party asserting the estoppel had a right to believe it was so intended; (3) the party asserting the estoppel must be ignorant of the true state of facts; and (4) the party asserting the estoppel must reasonably rely on the conduct to his or her injury.

Honig v. San Francisco Planning Dep't, 127 Cal. App. 4th 520, 529, 25 Cal. Rptr. 3d 649 (2005); *see also Lantzy v. Centex Homes*, 31 Cal. 4th 363, 383, 2 Cal. Rptr. 3d 655, 73 P.3d 517 (2003).

Plaintiffs both fail at step two. Neither Skuratovsky nor Zolotarev have shown that defendants should be equitably estopped as to his Section 1981 claim. The basis for equitable estoppel, according to plaintiffs, is that defendants concealed the fact that they hired unqualified Asian and Filipino applicants for 7371 positions for which they were purportedly qualified. This amounts to an argument that defendants are equitably estopped because they denied liability for the allegations in the complaint. Such an argument is untenable. "The defendant's statement or conduct must amount to a misrepresentation bearing on the necessity of bringing a timely suit; the defendant's mere denial of *legal liability* does not set up an estoppel." *Lantzy*, 31 Cal. 4th at 384 n. 18 (2003) (emphasis in original).

Plaintiffs have not pointed to any misrepresentations by defendants aimed at concealing the underlying facts about the 7371 hiring process. Zolotarev was not hired because he never submitted an application and never bothered to inquire as to why his application was not still pending based on his application to a different job classification. MUNI gave him no further information to distract him from the trail of his purported claim and did not tell him his 7409 application constituted an application for 7371 positions two years later.

Likewise, MUNI rejected Skuratovsky because he ranked lower than other candidates and because he failed to comply with the application procedures. This is

what MUNI told him. They did not make any false assertions about the qualifications of the other candidates or about the need for an experience verification. Equitable estoppel is not applicable.

CONCLUSION

For the foregoing reasons, Zolotarev and Skuratovsky's Section 1981 claims are time-barred. Defendants' motion is **GRANTED**. Finding no further argument necessary, the hearing on this motion is hereby **VACATED**.

IT IS SO ORDERED.

Dated: July 17, 2006

WILLIAM ALSUP
UNITED STATES DISTRICT JUDGE

- - - - - - - - - - - - - - - Footnotes - - - - - - - - - - - - - - -

1 It appears from the ranking list that Skuratovsky's total score was equal to another candidate John B. (John B. is not a party and since his personnel records have been filed under seal his name is concealed here) (Benay Decl. Exh. A, under seal). It is not clear whether John B. was placed above Skuratovsky on the list because of John B.'s higher written score, because John B.'s name precedes Skuratovsky alphabetically, or some other reason. This order does not resolve this ambiguity, however, since it only addresses the statute of limitations, not the existence of discrimination.

2 Plaintiffs also make claims for violation of 42 U.S.C.

1983 and for violations of the California Fair Housing and Employment Act.

3 Section 1981 was amended in 1990 so as to include a four-year limitations period for certain actions. This limitations period, however, does not apply to those actions which were cognizable under the pre-1990 version of Section 1981. *Cholla*, 382 F.3d at 974 n. 5 (citing *Jones v. R.R. Donnelley & Sons Co.*, 541 U.S. 369, 124 S. Ct. 1836, 158 L. Ed. 2d 645 (2004)). Plaintiffs Section 1981 claim for failure to hire would have been cognizable under the pre-1990 version. *See, e.g., Patterson v. McLean Credit Union*, 491 U.S. 164, 180-82, 109 S. Ct. 2363, 105 L. Ed. 2d 132 (1989).

4 Furthermore, equitable tolling is inappropriate as defendants have shown prejudice. "A plaintiff whose ignorance of the statutory period is excusable may file a lawsuit outside that period as long as he causes no prejudice to the defendants by doing so." *Guerrero*, 442 F.3d at 706; *Daviton.*, 241 F.3d at 1137. The loss of documents and the fading of memories is a real detriment to defendants preparing their case, given the elapsing of four years since the 7371 hiring in question in the complete absence of notice of a possible lawsuit.

No. C 06-02304 WHA

UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF CALIFORNIA

RICHARD GLASSMAN, MORRIS JACOBS, MICHAEL HALL, IGNACIA REYES, Plaintiffs,

v.

SAN FRANCISCO CITY & COUNTY, ELSON HAO, JIM WACHOB, ALAN DeGUZMAN, TOM HIDAYAT, Defendants.

September 14, 2006, Decided
September 14, 2006, Filed

JUDGES: WILLIAM ALSUP, UNITED STATES DISTRICT JUDGE.

ORDER GRANTING MOTION TO DISMISS AND VACATING HEARING

INTRODUCTION

In this employment-discrimination action, defendants move to dismiss plaintiffs' twice-amended complaint pursuant to Federal Rule of Civil Procedure 12(b)(6). Defendants, the City and County of San Francisco and four city employees, again move on the grounds that plaintiffs' claims are barred by the statute of limitations. This order finds that plaintiffs' claims accrued well more than one year prior to the filing of their complaint, and that plaintiffs have still not alleged sufficient facts to support a theory of equitable estoppel

of the time bar. Accordingly, defendants' motion is **GRANTED.** As plaintiffs have been given ample opportunity to cure the deficiencies in their complaint, this dismissal is with prejudice.

STATEMENT

Plaintiffs Richard Glassman, Morris Jacobs, Michael Hall and Ignacia Reyes were applicants for positions as electrical transit system mechanics ("7371 positions") in the maintenance division of the San Francisco's Municipal Transportation Agency ("MUNI"). Plaintiff Glassman applied for a 7371 position in June 2000 and was disqualified in November 2000, purportedly on grounds that he failed to provide a written verification of his prior work experience (Second Amd. Compl. Par 6). Plaintiff Jacobs' application for a 7371 position was similarly rejected in October 2000 on grounds that he failed to provide a written verification of his work history (*id.* at Par 7). Plaintiff Reyes' application for a 7371 position was also allegedly rejected in November 2000 for failure to provide a written verification of work experience (*id.* Par 9). Plaintiff Hall applied for a 7371 position in October 2000 and allegedly never received notification that his application was rejected (*id.* Par 8).

Plaintiffs alleged that defendants discriminated on the basis of race by giving preferential treatment to Asian and Filipino applicants for the 7371 positions. In 2001, defendants purportedly hired several Asian and Filipino applicants who did not meet the minimum qualifications for the job. Plaintiffs also contended that defendants modified the requirements for 7371 positions in late 2000, purportedly to make it easier for candidates who were Asian or Filipino. Plaintiffs also

alleged that defendants failed to provide sufficient information about the 7371 positions and the requirements for the positions to non-Asian and non-Filipino candidates.

This action is related to and contains similar allegations to an earlier-filed action, *Lukovsky, et al. v. City of San Francisco, et al.*, Case No. C 05-00389 WHA. On January 17, 2006, this Court issued an order in that action denying class certification in the *Lukovsky* action. The claims were thus to proceed individually. The January 17 order, however, allowed the *Lukovsky* plaintiffs' counsel to send letters to other individuals who would potentially have similar claims against the city and county, so that all such claims could be tried by the same judge. The *Lukovsky* action was terminated on August 14, 2006, pursuant to the parties' stipulated dismissal and judgment.

The four plaintiffs in *this* action responded to the letters of *Lukovsky* counsel, and chose to be jointly represented by her. Plaintiffs here have identified the letter from *Lukovsky* counsel as the event that notified them of the potential for an action.

Plaintiffs filed their complaint on March 31, 2006, alleging the above acts of discrimination under 42 U.S.C 1981, 1983, 1985, and 1986. Plaintiffs subsequently filed an amended complaint on June 14, 2006. On July 31, 2006, this Court issued an order dismissing plaintiffs' action without prejudice. The July 31 order found that all four of plaintiffs' claims were time-barred under the applicable one-year statute of limitations under these civil-rights statutes. The July 31 order concluded (July 31 Order at 7):

> Plaintiffs must allege more to avoid dismissal of claims that accrued five years before the filing of their complaint. This order grants plaintiffs a further opportunity to amend the complaint so as to plead sufficient allegations of equitable estoppel. This will be plaintiffs' final opportunity to amend.

On August 8, 2006, plaintiffs filed a second amended complaint. The second amended complaint only added two paragraphs to the first amended complaint, expanding on their contention that they relied on defendants' misrepresentations about the qualifications for the 7371 positions in failing to bring this action for over five years (Second Amd. Compl. Pars 22, 39). Defendants now move to dismiss the second amended complaint. [1]

ANALYSIS

A motion to dismiss under FRCP 12(b)(6) tests for legal sufficiency of the claims alleged in the complaint. A complaint should not be dismissed "unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief." *Conley v. Gibson*, 355 U.S. 41, 45-46, 78 S. Ct. 99, 2 L. Ed. 2d 80 (1957). On the other hand, "conclusory allegations of law and unwarranted inferences are insufficient to defeat a motion to dismiss for failure to state a claim." *Epstein v. Wash. Energy Co.*, 83 F.3d 1136, 1140 (9th Cir. 1996). A court has discretion to grant dismissal without leave to amend if "it determines that the pleading could not possibly be cured by the allegation of other facts." *Lopez v. Smith*, 203 F.3d 1122,

1127 (9th Cir. 2000) (en banc). That discretion is "particularly broad" where, as here, a court has previously given a party the opportunity to amend. *Chodos v. W. Publ'g Co.*, 292 F.3d 992, 1003 (9th Cir. 2002).

Defendants move to dismiss all of plaintiffs' claims on grounds that the claims are time-barred under the relevant statute of limitations. Much of this analysis is similar to that contained in the July 31 order, given that plaintiffs' second amended complaint added little to the first amended complaint.

"Dismissal on statute of limitations grounds can be granted pursuant to Fed. R. Civ. P. 12(b)(6) 'only if the assertions of the complaint, read with the required liberality, would not permit the plaintiff to prove that the statute was tolled.'" *TwoRivers v. Lewis*, 174 F.3d 987, 991 (9th Cir. 1999) (internal citations omitted).

1. APPLICABLE LIMITATIONS PERIOD.

The parties agree that the applicable statute of limitations is one year. Where, as here, the relevant statutes do not contain their own statutes of limitations, "courts borrow the most appropriate state statute of limitations." *Cholla Ready Mix, Inc. v. Civish*, 382 F.3d 969, 974 (9th Cir. 2004). [2] Accordingly, the appropriate California statute of limitations must be adopted for plaintiffs' claims under Sections 1981, 1983, 1985, and 1986. Courts have deemed the statute of limitations for personal-injury claims to be appropriate for these civil-rights statutes. *See Taylor v. Regents of Univ. of Cal.*, 993 F.2d 710, 711 (9th Cir. 1993) ("California's one-year statute of limitations for personal injury actions

governs claims brought pursuant to 42 U.S.C. §§ 1981, 1983 , and 1985"); *Guerrero v. Gates*, 442 F.3d 697, 705 (9th Cir. 2006). California amended its statute of limitations for personal injury claims from one to two years in January 2003. *Compare* Cal. Code Civ. Proc. § 340(3) *with* Cal. Code Civ. Proc. § 352.1. The modified statute, however, applies only to acts occurring after January 2003. *See, e.g., Guerrero*, 442 F.3d at 705 n. 32. [3]

Plaintiffs' claims, therefore, must satisfy the one-year statute of limitations provided for in Section 340(3).

2. WHEN PLAINTIFFS' CLAIMS ACCRUED.

The remaining issues are whether plaintiffs' claims accrued more than one year before they filed their initial complaint on March 31, 2006 and, if so, whether defendants are nevertheless equitably estopped from relying on the limitations defense.

"Although state law determines the length of the limitations period, federal law determines when a civil rights claim accrues." *Olsen v. Idaho State Bd. of Med.*, 363 F.3d 916, 926 (9th Cir. 2004) (internal citation omitted). "[A] claim accrues when the plaintiff knows or has reason to know of the injury which is the basis of the action." *Ibid.* (internal citation omitted). "Under federal law, 'a claim accrues when the plaintiff knows or has reason to know of the injury which is the basis of the action.'" *Azer v. Connell*, 306 F.3d 930, 936 (9th Cir. 2002) (quoting *Morales v. City of Los Angeles*, 214 F.3d 1151, 1154 (9th Cir. 2000)); *see also Aronsen v. Crown Zellerbach*, 662 F.2d 584, 593 (9th Cir. 1981) ("inquiry for purposes of determining when the limitations period

begins to run must center on the date when the employee has notice of the unlawful act"). [4]

Plaintiffs argue that their claims did not accrue until February 3, 2006, the date that they received a letter from counsel in the *Lukovsky* action about the nature of those proceedings. This order again finds otherwise.

The claims of plaintiffs Glassman, Jacobs and Reyes all accrued in October or November 2000. Each of these plaintiffs was formally notified of the rejection of their application at that time. All three of these plaintiffs were told the basis for rejection during at that time, which was failure to provide a written verification of relevant work history. The notification letters served as a final statement of Muni's position with respect to these plaintiffs' job applications. *See, e.g., Olsen*, 363 F.3d at 927 ("We hold that Olsen's claim accrued when she received the February 4, 1999 letter notifying her of the Board's proposal to deny her license reinstatement. The letter was 'adequately final and represented the [Board's] official position'") (internal citation omitted).

Although there is less precision as to the date on which plaintiff Hall's claims accrued, there is no doubt that they accrued years before plaintiffs' initial complaint in this action. As stated above, Hall alleged that he never received any notification from MUNI that his 7371 application was rejected. The lack of a formal notification letter, however, does not yield a meaningfully different accrual date than the other plaintiffs. It is reasonable to assume that Hall was aware that MUNI selected another candidate for the 7371 position by 2001, the time by which a successful

candidate for the 7371 position would have begun working for MUNI. Plaintiff Hall knew or should have known by early 2001 that MUNI had taken the final position of denying his application.

Each of the plaintiffs' claims, therefore, accrued at least *five* years prior to the filing of their complaint--well in excess of the one-year limitations period. Plaintiffs' argument that they did not know until other related plaintiffs filed a complaint, flies in the face of the purpose of having statutes of limitations. If claims did not accrue until similarly situated individuals brought suit, the statute of limitations could be tolled virtually indefinitely until the first plaintiff exerted marginal diligence in bringing the claims to light, rendering defendants permanently subject to possible suit. Here, plaintiffs have not alleged that they exerted *any* effort to investigate their purported claims, despite knowing for years of the rejection of their 7371 applications.

3. EQUITABLE ESTOPPEL.

Thus, absent equitable repose, plaintiffs' claims were time barred by late 2001 or early 2002. Plaintiffs are correct that "in civil rights suits, this court applies state tolling rules as long as they 'are not inconsistent with federal law.'" *Guerrero v. Gates,* 442 F.3d 697, 706 n. 34 (9th Cir. 2006) (internal citation omitted). "Equitable estoppel, also termed fraudulent concealment, halts the statute of limitations when there is 'active conduct by a defendant, above and beyond the wrongdoing upon which the plaintiff's claim is filed, to prevent the plaintiff from suing in time.'" *Id.* at 706 (internal citation omitted). Under California law, the elements of equitable estoppel are:

> (1) the party to be estopped must be apprised of the facts; (2) that party must intend that his or her conduct be acted on, or must so act that the party asserting the estoppel had a right to believe it was so intended; (3) the party asserting the estoppel must be ignorant of the true state of facts; and (4) the party asserting the estoppel must reasonably rely on the conduct to his or her injury.

Honig v. San Francisco Planning Dept., 127 Cal. App. 4th 520, 529, 25 Cal. Rptr. 3d 649 (2005); *see also Lantzy v. Centex Homes*, 31 Cal. 4th 363, 383, 2 Cal. Rptr. 3d 655, 73 P.3d 517 (2003). Plaintiffs here pled insufficient facts in their second amended complaint to support any possible application of equitable estoppel.

Plaintiffs did allege that defendants knew of the discrimination. Plaintiffs also alleged that they were unaware of the purported discrimination until they received notice from counsel in the *Lukovsky* action. They have thus satisfied the first and third factors of equitable estoppel under California law.

Plaintiffs, however, still have not identified any relevant misrepresentations by defendants upon which plaintiffs relied, or upon which defendants intended to induce reliance, such that plaintiffs were inhibited from investigating and bringing the instant lawsuit sooner than in five years.

Plaintiffs contend that defendants induced them not to sue by informing plaintiffs that they had "no right to appeal" the negative hiring decisions. This is not the

type of misrepresentation that satisfies the test for equitable estoppel. Defendants' misrepresentations or conduct must have "*actually and reasonably induced plaintiffs to forbear suing.*" *Lantzy*, 31 Cal. 4th at 385 (emphasis in original). Even if plaintiffs could have appealed the hiring determination, such an administrative appeal would not have "obviated the need for suit" on grounds of racial discrimination. *Ibid; see also Vu v. Prudential Property & Cas. Ins. Co.*, 26 Cal. 4th 1142, 1152, 113 Cal. Rptr. 2d 70, 33 P.3d 487 (2001) ("a denial of coverage, even if phrased as a 'representation' that the policy does not cover the insure's claim, or words to that effect, offers no grounds for estopping the insurer from raising a statute of limitations defense").

Plaintiffs also make the untenable argument that defendants are equitably estopped because they misrepresented the "fact" that differential standards were applied to Asian and Filipino applicants as compared to non-Asian and non-Filipino applicants (Second Amd. Compl. Pars. 22, 39). *Of course* defendants have denied this allegation and continue to do so--that is, they have denied and continued to deny that they hired in a discriminatory fashion in violation of the civil-rights statutes in issue. Plaintiffs' latest argument is essentially that because defendants denied liability, they are equitably estopped from relying on the statute of limitations. This plainly contradicts well-established law. "The defendant's statement or conduct must amount to a misrepresentation bearing on the necessity of bringing a timely suit; the defendant's mere denial of *legal liability* does not set up an estoppel." *Lantzy*, 31 Cal. 4th at 384 n. 18 (emphasis in original). Defendants' continued denial of racial

discrimination in the 7371 hiring process amounts to nothing more than such a denial of legal liability.

As the Supreme Court has explained, "statutes of limitations are not simply technicalities. On the contrary, they have long been respected as fundamental to a well-ordered judicial system." *Bd. of Regents of Univ. of State of N. Y. v. Tomanio*, 446 U.S. 478, 487, 100 S. Ct. 1790, 64 L. Ed. 2d 440 (1980). Plaintiffs' claims here are time barred. Plaintiffs apparently failed to do any investigation into the 7371 hiring until after other plaintiffs already filed actions. They essentially let their purported claims sit for five years without the slightest inquiry. Such delay undoubtedly prejudices defendants ability to mount a defense, given the inevitabilities of fading memories, loss of evidence, and changing personnel. To expect the City, County and their employees to defend such a stale action would ignore the very value of a statute of limitations.

CONCLUSION

For the foregoing reasons, defendants' motion to dismiss is **GRANTED**. Judgment will be entered accordingly. Finding no further argument necessary, the hearing on this motion is hereby **VACATED**.

IT IS SO ORDERED.

Dated: September 14, 2006.
/s/
WILLIAM ALSUP
UNITED STATES DISTRICT JUDGE

JUDGMENT

For the reasons stated in the accompanying order dismissing this action, **FINAL JUDGMENT IS HEREBY ENTERED** in favor of defendants and against plaintiffs. The Clerk **SHALL CLOSE THE FILE.**

IT IS SO ORDERED.

Dated: September 14, 2006.

/s/

WILLIAM ALSUP

UNITED STATES DISTRICT JUDGE

Filed 9/30/2008
No. 06-16665,
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

ALEX LUKOVSKY; MUHAMMED KHAN; LARRY MITCHELL; ANTONIO HUGGINS; SAMSON ASRAT,
Plaintiffs,

and

ANATOLIY ZOLOTAREV; YEVGENIY SKURATOVSKY, individually and on behalf of class members,
Plaintiffs-Appellants,

v.

CITY AND COUNTY OF SAN FRANCISCO; JOHN SADORRA; RENATO SOLOMON; VERNON CRAWLEY; MICHAEL ELLIS; DORIS LANIER,
Defendants-Appellees.

No. 06-16946

RICHARD GLASSMAN; MORRIS JACOBS; MICHAEL HALL; IGNACIO REYES, Plaintiffs-Appellants,

v.

CITY AND COUNTY OF SAN FRANCISCO; ELSON HAO; JIM WACHOB; ALAN DEGUZMAN; TOM HIDAYAT,

Defendants-Appellees.

ORDER

Before: O'SCANNLAIN, HAWKINS and MCKEOWN, Circuit Judges.

The panel has voted to deny Appellants' petition for rehearing and petition for rehearing en banc.

The full court has been advised of the petition for rehearing en banc and no Judge has requested a vote on whether to rehear the matter en banc. Fed. R. App. P 35.

The petition for rehearing and petition for rehearing en banc are DENIED.

42 USC § 1981. Equal rights under the law

(a) Statement of equal rights
All persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens, and shall be subject to like punishment, pains, penalties, taxes, licenses, and exactions of every kind, and to no other.
(b) "Make and enforce contracts" defined
For purposes of this section, the term "make and enforce contracts" includes the making, performance, modification, and termination of contracts, and the enjoyment of all benefits, privileges, terms, and conditions of the contractual relationship.
(c) Protection against impairment
The rights protected by this section are protected against impairment by nongovernmental discrimination and impairment under color of State law.

42 USC § 1983. Civil action for deprivation of rights

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress, except that in any action brought against a judicial officer for an act or omission taken in such officer's judicial capacity,

injunctive relief shall not be granted unless a declaratory decree was violated or declaratory relief was unavailable. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

42 USC § 1985. Conspiracy to interfere with civil rights

(1) Preventing officer from performing duties

If two or more persons in any State or Territory conspire to prevent, by force, intimidation, or threat, any person from accepting or holding any office, trust, or place of confidence under the United States, or from discharging any duties thereof; or to induce by like means any officer of the United States to leave any State, district, or place, where his duties as an officer are required to be performed, or to injure him in his person or property on account of his lawful discharge of the duties of his office, or while engaged in the lawful discharge thereof, or to injure his property so as to molest, interrupt, hinder, or impede him in the discharge of his official duties;

(2) Obstructing justice; intimidating party, witness, or juror

If two or more persons in any State or Territory conspire to deter, by force, intimidation, or threat, any party or witness in any court of the United States from attending such court, or from testifying to any matter pending therein, freely, fully, and truthfully, or to injure such party or witness in his person or property on account of his having so attended or testified, or to influence the verdict, presentment, or indictment of any grand or petit juror in any such court, or to injure such

juror in his person or property on account of any verdict, presentment, or indictment lawfully assented to by him, or of his being or having been such juror; or if two or more persons conspire for the purpose of impeding, hindering, obstructing, or defeating, in any manner, the due course of justice in any State or Territory, with intent to deny to any citizen the equal protection of the laws, or to injure him or his property for lawfully enforcing, or attempting to enforce, the right of any person, or class of persons, to the equal protection of the laws;

(3) Depriving persons of rights or privileges

If two or more persons in any State or Territory conspire or go in disguise on the highway or on the premises of another, for the purpose of depriving, either directly or indirectly, any person or class of persons of the equal protection of the laws, or of equal privileges and immunities under the laws; or for the purpose of preventing or hindering the constituted authorities of any State or Territory from giving or securing to all persons within such State or Territory the equal protection of the laws; or if two or more persons conspire to prevent by force, intimidation, or threat, any citizen who is lawfully entitled to vote, from giving his support or advocacy in a legal manner, toward or in favor of the election of any lawfully qualified person as an elector for President or Vice President, or as a Member of Congress of the United States; or to injure any citizen in person or property on account of such support or advocacy; in any case of conspiracy set forth in this section, if one or more persons engaged therein do, or cause to be done, any act in furtherance of the object of such conspiracy, whereby another is injured in his person or property, or deprived of having and exercising any right or privilege

of a citizen of the United States, the party so injured or deprived may have an action for the recovery of damages occasioned by such injury or deprivation, against any one or more of the conspirators.

42 USC § 1986. Action for neglect to prevent

Every person who, having knowledge that any of the wrongs conspired to be done, and mentioned in section 1985 of this title, are about to be committed, and having power to prevent or aid in preventing the commission of the same, neglects or refuses so to do, if such wrongful act be committed, shall be liable to the party injured, or his legal representatives, for all damages caused by such wrongful act, which such person by reasonable diligence could have prevented; and such damages may be recovered in an action on the case; and any number of persons guilty of such wrongful neglect or refusal may be joined as defendants in the action; and if the death of any party be caused by any such wrongful act and neglect, the legal representatives of the deceased shall have such action therefor, and may recover not exceeding $5,000 damages therein, for the benefit of the widow of the deceased, if there be one, and if there be no widow, then for the benefit of the next of kin of the deceased. But no action under the provisions of this section shall be sustained which is not commenced within one year after the cause of action has accrued.

42 USC § 2000e-5. Enforcement provisions

(a) Power of Commission to prevent unlawful employment practices

The Commission is empowered, as hereinafter provided, to prevent any person from engaging in any unlawful employment practice as set forth in section 2000e-2 or 2000e-3 of this title.

(b) Charges by persons aggrieved or member of Commission of unlawful employment practices by employers, etc.; filing; allegations; notice to respondent; contents of notice; investigation by Commission; contents of charges; prohibition on disclosure of charges; determination of reasonable cause; conference, conciliation, and persuasion for elimination of unlawful practices; prohibition on disclosure of informal endeavors to end unlawful practices; use of evidence in subsequent proceedings; penalties for disclosure of information; time for determination of reasonable cause

Whenever a charge is filed by or on behalf of a person claiming to be aggrieved, or by a member of the Commission, alleging that an employer, employment agency, labor organization, or joint labor-management committee controlling apprenticeship or other training or retraining, including on-the-job training programs, has engaged in an unlawful employment practice, the Commission shall serve a notice of the charge (including the date, place and circumstances of the alleged unlawful employment practice) on such employer, employment agency, labor organization, or joint labor-management committee (hereinafter referred to as the "respondent") within ten days, and shall make an

investigation thereof. Charges shall be in writing under oath or affirmation and shall contain such information and be in such form as the Commission requires. Charges shall not be made public by the Commission. If the Commission determines after such investigation that there is not reasonable cause to believe that the charge is true, it shall dismiss the charge and promptly notify the person claiming to be aggrieved and the respondent of its action. In determining whether reasonable cause exists, the Commission shall accord substantial weight to final findings and orders made by State or local authorities in proceedings commenced under State or local law pursuant to the requirements of subsections (c) and (d) of this section. If the Commission determines after such investigation that there is reasonable cause to believe that the charge is true, the Commission shall endeavor to eliminate any such alleged unlawful employment practice by informal methods of conference, conciliation, and persuasion. Nothing said or done during and as a part of such informal endeavors may be made public by the Commission, its officers or employees, or used as evidence in a subsequent proceeding without the written consent of the persons concerned. Any person who makes public information in violation of this subsection shall be fined not more than $1,000 or imprisoned for not more than one year, or both. The Commission shall make its determination on reasonable cause as promptly as possible and, so far as practicable, not later than one hundred and twenty days from the filing of the charge or, where applicable under subsection (c) or (d) of this section, from the date upon which the Commission is authorized to take action with respect to the charge.

(c) State or local enforcement proceedings; notification of State or local authority; time for filing charges with Commission; commencement of proceedings

In the case of an alleged unlawful employment practice occurring in a State, or political subdivision of a State, which has a State or local law prohibiting the unlawful employment practice alleged and establishing or authorizing a State or local authority to grant or seek relief from such practice or to institute criminal proceedings with respect thereto upon receiving notice thereof, no charge may be filed under subsection (a) [FN1] of this section by the person aggrieved before the expiration of sixty days after proceedings have been commenced under the State or local law, unless such proceedings have been earlier terminated, provided that such sixty-day period shall be extended to one hundred and twenty days during the first year after the effective date of such State or local law. If any requirement for the commencement of such proceedings is imposed by a State or local authority other than a requirement of the filing of a written and signed statement of the facts upon which the proceeding is based, the proceeding shall be deemed to have been commenced for the purposes of this subsection at the time such statement is sent by registered mail to the appropriate State or local authority.

(d) State or local enforcement proceedings; notification of State or local authority; time for action on charges by Commission

In the case of any charge filed by a member of the Commission alleging an unlawful employment practice

occurring in a State or political subdivision of a State which has a State or local law prohibiting the practice alleged and establishing or authorizing a State or local authority to grant or seek relief from such practice or to institute criminal proceedings with respect thereto upon receiving notice thereof, the Commission shall, before taking any action with respect to such charge, notify the appropriate State or local officials and, upon request, afford them a reasonable time, but not less than sixty days (provided that such sixty-day period shall be extended to one hundred and twenty days during the first year after the effective day of such State or local law), unless a shorter period is requested, to act under such State or local law to remedy the practice alleged.

(e) Time for filing charges; time for service of notice of charge on respondent; filing of charge by Commission with State or local agency; seniority system

(1) A charge under this section shall be filed within one hundred and eighty days after the alleged unlawful employment practice occurred and notice of the charge (including the date, place and circumstances of the alleged unlawful employment practice) shall be served upon the person against whom such charge is made within ten days thereafter, except that in a case of an unlawful employment practice with respect to which the person aggrieved has initially instituted proceedings with a State or local agency with authority to grant or seek relief from such practice or to institute criminal proceedings with respect thereto upon receiving notice thereof, such charge shall be filed by or on behalf of the person aggrieved within three hundred days after the alleged unlawful employment practice

occurred, or within thirty days after receiving notice that the State or local agency has terminated the proceedings under the State or local law, whichever is earlier, and a copy of such charge shall be filed by the Commission with the State or local agency.

(2) For purposes of this section, an unlawful employment practice occurs, with respect to a seniority system that has been adopted for an intentionally discriminatory purpose in violation of this subchapter (whether or not that discriminatory purpose is apparent on the face of the seniority provision), when the seniority system is adopted, when an individual becomes subject to the seniority system, or when a person aggrieved is injured by the application of the seniority system or provision of the system.

(f) Civil action by Commission, Attorney General, or person aggrieved; preconditions; procedure; appointment of attorney; payment of fees, costs, or security; intervention; stay of Federal proceedings; action for appropriate temporary or preliminary relief pending final disposition of charge; jurisdiction and venue of United States courts; designation of judge to hear and determine case; assignment of case for hearing; expedition of case; appointment of master

(1) If within thirty days after a charge is filed with the Commission or within thirty days after expiration of any period of reference under subsection (c) or (d) of this section, the Commission has been unable to secure from the respondent a conciliation agreement acceptable to the Commission, the Commission may bring a civil action against any respondent not a government, governmental agency, or political

subdivision named in the charge. In the case of a respondent which is a government, governmental agency, or political subdivision, if the Commission has been unable to secure from the respondent a conciliation agreement acceptable to the Commission, the Commission shall take no further action and shall refer the case to the Attorney General who may bring a civil action against such respondent in the appropriate United States district court. The person or persons aggrieved shall have the right to intervene in a civil action brought by the Commission or the Attorney General in a case involving a government, governmental agency, or political subdivision. If a charge filed with the Commission pursuant to subsection (b) of this section is dismissed by the Commission, or if within one hundred and eighty days from the filing of such charge or the expiration of any period of reference under subsection (c) or (d) of this section, whichever is later, the Commission has not filed a civil action under this section or the Attorney General has not filed a civil action in a case involving a government, governmental agency, or political subdivision, or the Commission has not entered into a conciliation agreement to which the person aggrieved is a party, the Commission, or the Attorney General in a case involving a government, governmental agency, or political subdivision, shall so notify the person aggrieved and within ninety days after the giving of such notice a civil action may be brought against the respondent named in the charge (A) by the person claiming to be aggrieved or (B) if such charge was filed by a member of the Commission, by any person whom the charge alleges was aggrieved by the alleged unlawful employment practice. Upon application by the complainant and in such circumstances as the court may

deem just, the court may appoint an attorney for such complainant and may authorize the commencement of the action without the payment of fees, costs, or security. Upon timely application, the court may, in its discretion, permit the Commission, or the Attorney General in a case involving a government, governmental agency, or political subdivision, to intervene in such civil action upon certification that the case is of general public importance. Upon request, the court may, in its discretion, stay further proceedings for not more than sixty days pending the termination of State or local proceedings described in subsection (c) or (d) of this section or further efforts of the Commission to obtain voluntary compliance.

(2) Whenever a charge is filed with the Commission and the Commission concludes on the basis of a preliminary investigation that prompt judicial action is necessary to carry out the purposes of this Act, the Commission, or the Attorney General in a case involving a government, governmental agency, or political subdivision, may bring an action for appropriate temporary or preliminary relief pending final disposition of such charge. Any temporary restraining order or other order granting preliminary or temporary relief shall be issued in accordance with rule 65 of the Federal Rules of Civil Procedure. It shall be the duty of a court having jurisdiction over proceedings under this section to assign cases for hearing at the earliest practicable date and to cause such cases to be in every way expedited.

(3) Each United States district court and each United States court of a place subject to the jurisdiction of the United States shall have jurisdiction of actions brought under this subchapter. Such an action may be brought

in any judicial district in the State in which the unlawful employment practice is alleged to have been committed, in the judicial district in which the employment records relevant to such practice are maintained and administered, or in the judicial district in which the aggrieved person would have worked but for the alleged unlawful employment practice, but if the respondent is not found within any such district, such an action may be brought within the judicial district in which the respondent has his principal office. For purposes of sections 1404 and 1406 of Title 28, the judicial district in which the respondent has his principal office shall in all cases be considered a district in which the action might have been brought.

(4) It shall be the duty of the chief judge of the district (or in his absence, the acting chief judge) in which the case is pending immediately to designate a judge in such district to hear and determine the case. In the event that no judge in the district is available to hear and determine the case, the chief judge of the district, or the acting chief judge, as the case may be, shall certify this fact to the chief judge of the circuit (or in his absence, the acting chief judge) who shall then designate a district or circuit judge of the circuit to hear and determine the case.

(5) It shall be the duty of the judge designated pursuant to this subsection to assign the case for hearing at the earliest practicable date and to cause the case to be in every way expedited. If such judge has not scheduled the case for trial within one hundred and twenty days after issue has been joined, that judge may appoint a master pursuant to rule 53 of the Federal Rules of Civil Procedure.

(g) Injunctions; appropriate affirmative action; equitable relief; accrual of back pay; reduction of back pay; limitations on judicial orders

(1) If the court finds that the respondent has intentionally engaged in or is intentionally engaging in an unlawful employment practice charged in the complaint, the court may enjoin the respondent from engaging in such unlawful employment practice, and order such affirmative action as may be appropriate, which may include, but is not limited to, reinstatement or hiring of employees, with or without back pay (payable by the employer, employment agency, or labor organization, as the case may be, responsible for the unlawful employment practice), or any other equitable relief as the court deems appropriate. Back pay liability shall not accrue from a date more than two years prior to the filing of a charge with the Commission. Interim earnings or amounts earnable with reasonable diligence by the person or persons discriminated against shall operate to reduce the back pay otherwise allowable.

(2)(A) No order of the court shall require the admission or reinstatement of an individual as a member of a union, or the hiring, reinstatement, or promotion of an individual as an employee, or the payment to him of any back pay, if such individual was refused admission, suspended, or expelled, or was refused employment or advancement or was suspended or discharged for any reason other than discrimination on account of race, color, religion, sex, or national origin or in violation of section 2000e-3(a) of this title.

(B) On a claim in which an individual proves a violation under section 2000e-2(m) of this title and a respondent

demonstrates that the respondent would have taken the same action in the absence of the impermissible motivating factor, the court--

> (i) may grant declaratory relief, injunctive relief (except as provided in clause (ii)), and attorney's fees and costs demonstrated to be directly attributable only to the pursuit of a claim under section 2000e-2(m) of this title; and
>
> (ii) shall not award damages or issue an order requiring any admission, reinstatement, hiring, promotion, or payment, described in subparagraph (A).

(h) Provisions of chapter 6 of Title 29 not applicable to civil actions for prevention of unlawful practices

The provisions of chapter 6 of Title 29 shall not apply with respect to civil actions brought under this section.

(i) Proceedings by Commission to compel compliance with judicial orders

In any case in which an employer, employment agency, or labor organization fails to comply with an order of a court issued in a civil action brought under this section, the Commission may commence proceedings to compel compliance with such order.

(j) Appeals

Any civil action brought under this section and any proceedings brought under subsection (i) of this section

shall be subject to appeal as provided in sections 1291 and 1292, Title 28.

(k) Attorney's fee; liability of Commission and United States for costs

In any action or proceeding under this subchapter the court, in its discretion, may allow the prevailing party, other than the Commission or the United States, a reasonable attorney's fee (including expert fees) as part of the costs, and the Commission and the United States shall be liable for costs the same as a private person.

29 USC § 623. Prohibition of age discrimination

(d) Opposition to unlawful practices; participation in investigations, proceedings, or litigation

It shall be unlawful for an employer to discriminate against any of his employees or applicants for employment, for an employment agency to discriminate against any individual, or for a labor organization to discriminate against any member thereof or applicant for membership, because such individual, member or applicant for membership has opposed any practice made unlawful by this section, or because such individual, member or applicant for membership has made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or litigation under this chapter.